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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 709

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and JOHN S. GORSUCH and ALBERT J. DOIG, *Petitioners*

v.

ANGUS J. DePINTO, HJALMAR B. LANDOE, FRANCIS I. SABO, EDWIN B. PEGRAM and ELMER W. DUHAME, *Respondents*

RESPONDENT HJALMAR B. LANDOE'S BRIEF and OBJECTION TO THE PETITION FOR A WRIT OF CERTIORARI

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INDEX

Page

Argument 2

1. Defendants never waived a jury trial under Rule 38(d) and the Court improperly applied Rule 39(a) 2

2. The action against Respondent Landoe was not a true stockholder's derivative suit, but a tort and triable as a matter of right before a jury. 5

3. The trial court by its judgment n.o.v. deprived Respondent Landoe of a jury trial in violation of the Seventh Amendment of the Constitution of the United States 8

4. The trial court by its additur likewise deprived Respondent Landoe of a jury trial in violation of the Seventh Amendment of the Constitution of the United States 11

5. Summarization ..... 13.

Cases

Beacon Theatres v. Westover, 359 U. S. 500, 510, 3 L. Ed. 2d 988, 79 S. Ct. 948 ..... 2, 14

Dairy Queen v. Wood, 369 U.S. 469, 8 L. Ed. 2d 44, 82 S. Ct. 894 ..... 3, 8, 9, 10, 14

Dimick v. Schiedt, 293 U.S. 474, p. 482 13

Fleitmann v. Weisback, 240 U.S. 27 ..... 6, 14

Federal Rules of Civil Procedure

Rule 38(b) 3, 5

Rule 38(d) 2, 3, 4

Rule 39(a) 2, 4, 5, 9

Rule 50(b) 11

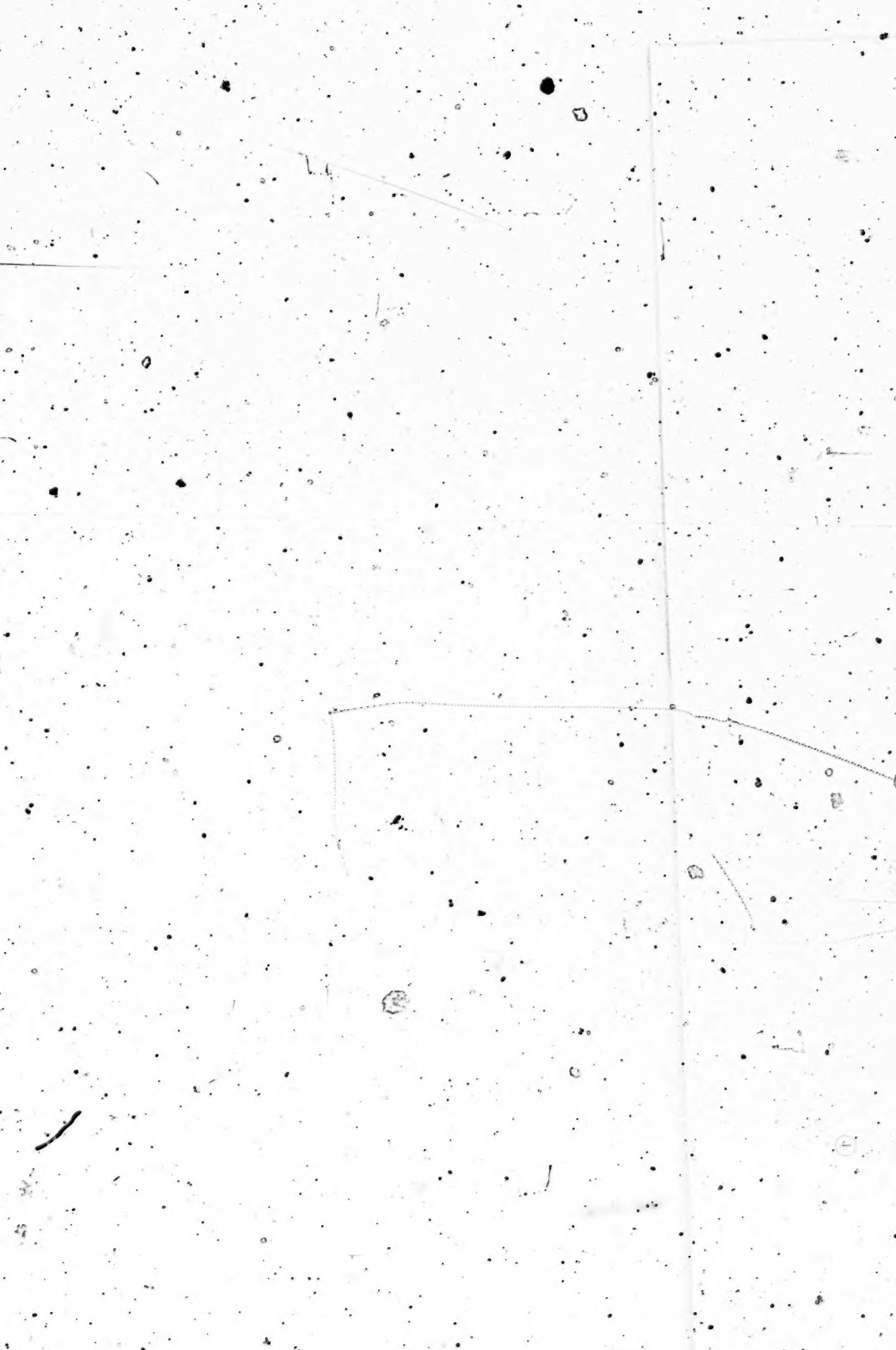
Constitution of the United States

Amend. VII 7, 8, 11

Text

5 Moore, Federal Practice, Section 38-45, p. 343 4

5 Moore, Federal Practice, p. 2313 11



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In the above matter, the Circuit Court of the Ninth Circuit, after the second appeal to that Court, remanded the case to the District Court for a new trial upon the ground primarily that the appealing defendants had been deprived of a jury trial by the act of the trial court granting the judgment n.o.v. In addition, the Circuit Court held the trial court was in error and in violation of the Seventh

Amendment by having granted the additur from $20,000. the jury's verdict, to $314,794.19, the court's verdict.

Respondent Landoe files his objections to the Petition for a Writ of Certiorari upon the following grounds:

(1) Defendants never waived a jury trial under Rule 38(d) and the Court improperly applied Rule 39(a);

(2) The action against Respondent Landoe was not a true stockholder's derivative suit, but a tort and triable as a matter of right before a jury;

(3) The trial court by its judgment n.o.v. deprived Respondent Landoe of a jury trial in violation of the Seventh Amendment of the Constitution of the United States;

(4) The trial court by its additur likewise deprived the Respondent Landoe of a jury trial in violation of the Seventh Amendment of the Constitution of the United States.

ARGUMENT

1. DEFENDANTS NEVER WAIVED A JURY TRIAL UNDER RULE 38(d) AND THE COURT IMPROPERLY APPLIED RULE 39(a).

Preliminary to the consideration of these questions is the holding of this Court in Beacon Theatres v. Westover, 359 U.S. 500, 510, 3 L. Ed. 2d 988, 79 S. Ct. 948:

> "As this Court said in Scott v. Neely, 140 U.S. 106, 109, 110, 35 L. ed. 358, 360, 11 S. Ct. 712: 'In the Federal courts this (jury) right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.'

> This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims. See Lemert v. Woods (CA 8 Mo) 196 F 2d 828, 833-836."

We contend that under the factual situation of this case as concerns all the appealing defendants and in particular Respondent Landoe, that it does not require re-examination of Dairy Queen v. Wood, 369 US 469, 8 L. ed 2d 44, 82 S. Ct. 894, or Beacon Theatres v. Westover, supra, for the very reasons that there is a definite element of estoppel in this case that alone justifies the Circuit Court of Appeals' decision remanding this case for new trial.

The plaintiff in the trial court, after filing his alleged stockholder's derivative suit, made a demand for a jury trial (Tr. 33) on March 13, 1959, and he had filed the complaint on November 4, 1958 (Tr. 22). The demand was made by the plaintiff before the issues were joined and as a result of the demand for the jury trial, the plaintiff caused all defendants to rely upon this demand, and in reliance thereon no defendant made a demand for a jury trial as provided for under Rule 38(b). Therefore, there was never any waiver of a demand for jury trial as provided for by Rule 38(d).

After the issues were formed, the plaintiff moved the Court to deny the defendants a jury trial (Tr. 234) but the defendants, including Respondent Landoe, did not consent to this motion to withdraw the case from a jury. The trial court, instead of ruling upon the motion so that a Writ of Mandamus might have been filed by the defendants as

was done in Beacon Theatres v. Westover, supra, made the following ruling:

> "Plaintiff's Motion for Findings by Court Pursuant to Rule 39(a)(2) Re: Jury Trial is heard and determination thereof continued; jury to be empaneled and verdict to be deemed advisory if the motion for non-jury trial is ultimately granted." (Tr. 210c).

With that ruling, the defendants were compelled to proceed to the trial before the jury, and after the entire case was tried and submitted to a jury, the jury verdict was set aside, the additur was made by the Court, and the appeal taken to the Circuit Court and this was the first time the question could be raised of the right to a jury trial.

The action of the trial court was not permitted under Rule 38(d), last sentence, which provides as follows:

> "A demand for trial by jury made, as herein provided, may not be withdrawn without the consent of the parties."

In 5 Moore, Federal Practice, Section 38-45, p. 343, it is stated:

> "The last sentence of Rule 38 (also of subdivision (d) states: 'A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.' In other words if a timely and proper demand for jury is made all other parties in the action who are affected by the demand may rely thereon and need not make a jury demand for issues embraced therein. Thus if the plaintiff makes a timely general demand for jury the defendant may rely thereon and the plaintiff cannot dispense with a jury trial as to some or all of the issues between them without the consent of the defendant. Or, if the defendant

should make the initial general demand for jury, the plaintiff, even though jury trial is more important to him, need make no demand. He may rely with safety upon defendant's demand. Without the provision against withdrawal, a party might withdraw his demand after the time for demanding a jury had run and thus deprive the adverse party of jury trial. Sharp practice is avoided."

The Court apparently set the verdict aside under the provisions of Rule 39(a)(2), but the statement of the facts shows that the very purpose and meaning of Rule 38(d) was violated by the trial court's action in this case, by its ruling on the motion made under 39(a) after the trial was over, and after the Court had forced the defendants to a trial, all in direct violation of Rule 38(d). For these reasons alone, the decision of the Circuit Court should be affirmed and the case remanded for new trial.

2. THE ACTION AGAINST RESPONDENT LANDOE WAS NOT A TRUE STOCKHOLDERS' DERIVATIVE SUIT, BUT A TORT AND TRIABLE AS A MATTER OF RIGHT BEFORE A JURY

In Petitioner's statement, it is unequivocally stated that the case is solely a stockholder's derivative suit, being an action by Plaintiff Gorsuch on behalf of the stockholders of United Security Life against the directors of United Security Life and other defendants, including American Security Investment Company and the Respondent Ejnamar B. Landoe.

Respondent Landoe would like to call this Court's attention to the fact that at no time do the pleadings, the facts, nor does the judgment of the District Court show that Respondent Landoe was ever a director or officer of United

Security Life, predecessor of Provident Security Life Insurance Company. Therefore, the suit as to Landoe is not a true stockholder's derivative suit, but an action in tort for damages for an alleged act of gross negligence committed by Landoe when acting in his capacity as a director of a wholly independent, separate corporation, the American Security Investment Company, also one of the defendants.

Landoe's liability, if any, has to be predicated upon an act that is cognizable in a suit at common law. As the Circuit Court said on pages 16 and 17 of its decision:

> "An action brought by the corporation to recover damages against former officers or directors on the ground of negligence would be cognizable in a suit at common law. *Kelly v. Dolan*, 8 Cir., 233 Fed. 638. Thus all appellants were denied a jury trial on an issue cognizable in a suit at common law. Landoe was necessarily aggrieved by this denial since, as to him, this was the only basis of the judgment."

The Respondent Landoe's position in this case is identical to that of the corporate defendants other than Consolidated Street Lighting Co. in Fleitmann v. Welsback, 240 U.S. 27. In the Fleitmann case there was a bill by a stockholder of the Consolidated Street Lighting Co. against that company and its directors, and a number of other corporations and individuals, and in the bill it alleged that the directors of Consolidated Street Lighting Co. refused to bring the action under the Sherman Act and that the action was in the nature of a stockholder's derivative suit. The bill was dismissed by the District Court on demurrer of other corporate defendants and was appealed to the Circuit Court and affirmed by this Supreme Court.

Applicable to the case at bar is a citation from this appearing on page 28 as follows:

"Of course the claim set up is that of the corporation alone, and if the corporation were proceeding directly under the statute no one can doubt that its only remedy would be at law. Therefore the inquiry at once arises why the defendants' right to a jury trial should be taken away because the present plaintiff cannot persuade the only party having a cause of action to sue, —how the liability which is the principal matter can be converted into an incident of the plaintiff's domestic difficulties with the company that has been wronged.

"No doubt there are cases in which the nature of the right asserted for the company, or the failure of the defendants concerned to insist upon their rights, or a different state system, has led to the whole matter being disposed of in equity; but we agree with the court below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary, it plainly provides the latter remedy, and it provides no other. Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 376."

Therefore, the depriving of a jury trial to Respondent Landoe clearly violates the Seventh Amendment because the cause of action against him was founded on a legal remedy in tort, he was entitled to a jury trial as a matter of right, and the action of the Circuit Court of Appeals was correct in granting a new trial as concerns Respondent Landoe. For these reasons, we again submit that the Writ of Certiorari should be denied in this respect, if for no other reason, as concerns Respondent Landoe.

3. THE TRIAL COURT BY ITS JUDGMENT N.O.V. DEPRIVED RESPONDENT LANDOE OF A JURY TRIAL IN VIOLATION OF THE SEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Circuit Court of Appeals in the present case held that as concerns the five appealing defendants, that the plaintiff was seeking money damages for negligence against all five defendants, and in addition, was seeking damages for a breach of a fiduciary duty against all the defendant except Landoe. The Circuit Court on page 17 of its opinion held:

> "Having in mind the necessity of scrutinizing, with utmost care, any seeming curtailment of the right to a jury trial, we hold that where a claim of breach of fiduciary duty is predicated upon underlying conduct, such as negligence, which is actionable in a direct suit at common law, the issue of whether there has been such a breach is, subject to appropriate instructions, a jury question. We therefore conclude that, in the context of this case, the question concerning breach of fiduciary duty, as well as negligence, should have been submitted to the jury.
>
> "It follows that, as to all of the appellants, the judgment rests upon issues which appellants were entitled to have submitted to a jury and upon findings which appellants were entitled to have made by jury. The trial court therefore erred in ruling that the jury verdicts were advisory only, and in basing the judgment upon court-made findings of fact."

Authority for the above is Dairy Queen v. Wood, 369 U.S. 469, 8 L. ed. 2d. 44, 82 S. Ct. 894. This case was basi

ally one wherein the plaintiff moved to strike the defendant's demand for a jury trial upon the ground that the action was purely equitable, or if not purely equitable, whatever legal issues were raised were incidental to equitable issues and that no right to a trial by jury existed. Upon a petition for a Writ of Mandamus, the Court of Appeals of the Third Circuit denied the request and Certiorari was granted by the Supreme Court. Under the Seventh Amendment and Rule 38(a), despite the semantics attempted to be drawn by Petitioner in this case, the decision clearly and explicitly holds that on the legal issues interposed in any case where there is a joinder of equitable and legal issues either party is entitled to a jury trial as a matter of right on the legal issues. Applying the rationale of the Dairy Queen case to the position of Respondent Landon, it is self evident that inasmuch as the liability, or lack of Landon rested upon a tort against United Security Life, that he was entitled to a jury trial not only in light of the Beckman case, supra, but also all defendants were entitled to a jury trial under Dairy Queen v. Wood, as this Court said on page 470:

> "At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury, that based upon the view that the right to trial by jury may be lost as to legal issues where those issues are characterized as 'incidental' to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts."

The Petitioner contends that a stockholders derivative action is solely an equity action and that the damages are incidental and that under Rule 39(b) there was no equitable factual issue as to the defendants' liability or the amount

of the damages. The reasoning is difficult to comprehend in light of the fact that a jury hearing this case found the damages to be at $20,000 and the District Court assessed the damages in excess of $314,000. Very obviously a question of fact then exists as to what the actual damages are. Reasonable men have certainly disagreed and therefore, to conclude as Petitioner attempts to, that there was no question of fact as to what the damages are seems a deliberate distortion of the factual situation and the law applicable to that. Combined with this is the law question of liability, if any, and against whom.

We submit that in the case at bar even as concerns the directors of United Security Life, the equity aspect was merely incidental to the main legal issues which were liability and damages. These being questions of law, the rule of Dairy Queen as stated by Mr. Justice Black on page 472 controls:

> "The holding in Beacon Theatres was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such 'imperative circumstances', Beacon Theatres requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury. There being no question of the timeliness or correctness of the demand involved here, the sole question which we

must decide is whether the action now pending before the District Court contains legal issues."

The Circuit Court rightly decided and determined that the case involved legal issues and an examination of the pleadings, the relief sought, money damages recovered, all based on alleged tortious conduct, it is evident that there were legal issues involved and as a matter of right the Appellants and Respondent Landoe was entitled to a jury trial, of which they were deprived by the trial court's judgment n.o.v.

4. THE TRIAL COURT BY ITS MIDITUR LIKEWISE DEPRIVED RESPONDENT LANDOE OF A JURY TRIAL IN VIOLATION OF THE SEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Petitioner submits that the action of the District Court in raising the jury verdict from $20,000 to $314,749.19 was authorized under Civil Rule 50(b) and was not in any true sense an additur, but in essence a directed verdict. The applicable law of when a directed verdict should be granted is summarized in 5 Moore's Federal Practice, p. 2313:

The directed verdict is a devise to save the time and trouble involved in lengthy jury determination normally used when: (1) there is a complete absence of pleading or proof on an issue or issues material to the cause of action or defense; or (2) there are no controverted issues of fact upon which reasonable men could differ. The first category is obvious since the party has no pleadings of a prima facie case or defense to carry him to the jury. As to the second category, although the statements concerning directed verdicts are often extremely ambiguous, a verdict will not

mally be directed where both the facts and the inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, point so strongly in favor of one party or the other that the court feels reasonable men could not possibly come to a contrary conclusion.

In other words, where the evidence is such that without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or judgment n.o.v. The argument that the directed verdict practice as presently administered is unconstitutional because higher standards of proof are required than when the Seventh Amendment was adopted, and because the granting of a motion for directed verdict precludes plaintiff from another chance to prove his case, was rejected by the Supreme Court in *Galloway v. United States*. But where the evidence is conflicting or there is insufficient evidence to make only a "one-way" verdict reasonably possible, a directed verdict is improper.

The test in the case at bar was not met for the granting of a directed verdict and proof of this is shown by a recitation of the facts. The jury of twelve found a verdict in favor of Duhame and DePinto and against Sabo, Landoe and Pegram—the District Court, in granting the judgment n.o.v. felt there was unjust discrimination against Sabo, Landoe and Pegram and entered a verdict against Duhame and DePinto. The jury, as stated, found the damages were in the sum of $20,000—the District Court found damages in excess of $314,000. These were issues of fact that reasonable men did disagree upon.

To say the facts are undisputed as to the question of duty, negligence and damages is to tax beyond reason the credulity of this Supreme Court. Counsel for the five appealing defendant have felt so strongly about this that they have appealed the case twice to the Circuit Court of Appeals

and to attempt to dismiss the whole matter as Petitioner is attempting to do by stating that there is no dispute as to facts or damages is completely unwarranted.

If the trial court believed that the verdict was improper his only alternative was to grant a new trial; but he had no right as the Circuit Court of Appeals held to enter judgment n.o.v.

The trial court, by its judgment n.o.v., added an additur in violation of the prohibitions of Dimick v. Schiedt, 293 U.S. 474, p. 482:

> "From the foregoing and from many other English authorities which we have examined but deem it unnecessary to cite, we conclude that, while there was some practice to the contrary in respect of *decreasing* damages, the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to *increase* the amount of damages awarded by a jury in actions such as that here under consideration."

The Circuit Court of Appeals, in holding the additur improper, quoted from the Dimick case, page 480-487 on page 19 of the opinion in Note 28, and held that the only right that the District Judge had in this case, feeling the verdict was insufficient, was to grant a new trial. The Circuit Court of Appeals, then, has granted the new trial and it should be remanded for that purpose.

SUMMARIZATION

From the consideration of the above four points raised by the Respondent Landoe, we respectfully submit that the action of the Circuit Court of Appeals was correct under the applicable law and that a new trial should be given to

the defendants and all of them. There is no basis under the facts or the law for the granting of a Writ of Certiorari in the light of the Beacon Theatres, the Dairy Queen, and the Fleetmann cases, all supra, and for these reasons we submit that the Petition should be denied.

RESPECTFULLY SUBMITTED,

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